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August 5, 2005

BY FAX AND HAND DELIVERY

Mr. George Kelhart
Marketing Order Administration Branch
Fruit and Vegetable Programs
Agricultural Marketing Service, USDA
1400 Independence Avenue SW
STOP 0237
Washington, DC 20250-0237

Re: **Request for Indefinite Suspension of Proposed Rulemaking**
Docket Number FV03-925-1PR
Grapes Grown in a Designated Area of Southeastern California
And Imported Table Grapes; Proposed Change in Regulatory Periods

Dear Mr. Kelhart

On behalf of ASOEX, a trade association¹ of Chilean fruit growers and fresh fruit exporters whose members account for approximately 90% of Chilean table grape imports to the United States, this firm is requesting an indefinite suspension of the Proposed Rulemaking process in view of fatal procedural and substantive irregularities. As more fully set forth below, the Proposed Rule has been issued in contravention of the statutory requirements of the Agricultural Marketing Agreement Act of 1937, as amended (AMAA) and the procedural requirements of the Administrative Procedure Act.

This firm has reviewed the documents released pursuant to a FOIA² request that USDA required us to make in order to gain access to a notice and comment rulemaking record. In addition to the procedural irregularity of providing the rulemaking record only through a FOIA request, the documents provided do not include all records relied upon by the agency in publishing the above referenced Proposed Rule. For that reason alone, USDA cannot legally proceed with this

¹ A list of the members of ASOEX is attached hereto as Exhibit A.

² A copy of the FOIA request and response is attached hereto as Exhibit B.

rulemaking since the refusal of the agency to release for notice and comment the full rulemaking record renders the agency action void as a matter of law.

We have also noted, among other deficiencies, that the documents released by USDA pursuant to the FOIA request and the data referenced in the Proposed Rule do not contain any data or analysis for the last Chilean shipping season (2004-2005) or the last Coachella season, which has just concluded. Under the governing statute, USDA cannot amend the beginning and ending dates of Table Grape Marketing Order No. 925 or the companion Table Grape Import Regulation No. 4 without compiling and analyzing data for “the previous year.”

Under 7 U.S.C. §608c(1), USDA may issue and amend orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product specified in subsection (2). 7 U.S.C. §608e-1 authorizes USDA to impose, on the importation of commodities, the same minimum requirements for grade, size, quality, and maturity that apply to comparable domestic commodities under marketing orders, whenever such marketing orders are in effect. *See*, 7 U.S.C. §608e-1(a). USDA may also extend the period of time covered by a marketing order as applied to imports through Table Grape Import Regulation No. 4 by a period not to exceed 35 days, if the Secretary determines that such additional period of time is necessary: (A) to effectuate the purposes of the Act; and (B) to prevent the circumvention of the grade, size, quality, or maturity standards of a seasonal marketing order applicable to a commodity produced in the United States by imports of such commodity. *See*, 7 U.S.C. §608e-1(b)(1).

In extending the period of a marketing order under the AMAA, the Secretary must consider:

to what extent, *during the previous year*, imports of a commodity that did not meet the requirements of a marketing order applicable to such commodity were marketed in the United States *during the period that such marketing order requirements were in effect for available domestic commodities*; if the importation into the United States of such commodity did, or *was likely to, circumvent* the grade, size, quality or maturity standards of a seasonal marketing order applicable to such commodity produced in the United States; and *the availability and price of commodities of the variety covered* by the marketing order during any additional period the marketing order requirements are to be in effect.

See, 7 U.S.C. §608e-1 (b)(2) (emphasis added). USDA, as a legal matter, must pay very close attention to the specific statutory criteria governing the imposition of a beginning marketing order date that, on average, precedes the availability of *all* domestic varieties by more than 35 days and will be imposed on import varieties from Chile when there are *none of the same varieties* available from domestic sources. More specifically, the Proposed Rule will impose marketing order standards on Chilean supplies of Thompsons and Crimsons during a period when no supplies of Thompsons or Crimsons are available from domestic sources, and when no significant commercial quantities are available of any domestic variety.

Under 7 U.S.C. §608e-1 (b)(2)(a), a change in the beginning effective date of a marketing order to a time prior to the availability of domestic supplies can only be made if the rulemaking record establishes that: (1) *during the previous year*; (2) *imports were marketed during a period that marketing order requirements were in effect*; (3) *for available domestic commodities*. As a

preliminary matter, the statutory framework requires the agency to determine the date from which the 35 days may be counted. Clearly, the 35 days cannot be counted from April 20. April 20 already precedes by 21 days the historical average beginning pack-out of commercially significant quantities (20,000 cases or more) of Coachella's early season Perlettes, the only variety that has any possibility of competing with Chilean Thompsons. The existing April 20 date already exceeds the statutory limit of 35 days for the historical average beginning pack-out of Coachella Thompsons. The statute cannot be read as a progressive bootstrapping device to permit repeated extensions of the marketing order date in 35-day increments. Therefore, the proposal to exceed the 35 days permitted by the statute is a violation of the legislative mandate.

After determining the base date, the statute requires the agency to evaluate marketing practices "*during the previous year.*" If this Proposed Rule goes into effect in 2006, the previous year must be 2005. No data for the 2004-2005 Chilean season or the 2005 Coachella season was available when the Proposed Rule was published, so there is no basis in the rulemaking record for a proposal based on any marketing practices "*during the previous year*" within the meaning of the statute. Until 2005 data is made available for analysis, no rule that changes the beginning effective date can legally be promulgated.

In addition, the *varieties* of fresh table grapes supplied by Chile have never been marketed at the same time as the same varieties supplied by domestic sources. In April and May, Chile supplies end-of-season Thompsons and Crimsons. Thompsons and Crimsons are not packed-out from Coachella until mid to late June and July. Therefore, the rulemaking record can never support a finding that, during the previous year or any year, Chilean supplies have circumvented marketing order standards applied to *available* domestic commodities within the meaning of the AMAA.

The third statutory condition for changing the date requires the agency to determine whether there would be any adverse effect on the availability and prices of grapes if the regulatory period for imports were changed to April 1. Under 7 U.S.C. § 608 e-1(b)(2), USDA must examine "the availability and price of *commodities of the variety* covered by the marketing order *during any additional period the marketing order requirements are to be in effect.*" 7 U.S.C. §608e-1(b)(2) (emphasis added). Thus, the statutory language mandates an examination of availability and price of grape by *variety*. However, no relevant varietal data has been described – much less analyzed – in the Proposed Rule. Nor has any varietal data been submitted or analyzed to demonstrate the substitutability of one variety for another, e.g. Thompsons and Perlettes. In the event that USDA takes steps to comply with the statutory mandate by gathering and analyzing relevant data, the rulemaking nevertheless remains procedurally deficient and invalid unless ASOEX is given fair notice and opportunity to comment on such data.

Contrary to this statutory mandate, the Proposed Rule contains a cursory and anecdotal account of the availability and prices of grapes for a period prior to the availability of domestic supplies of the relevant varieties. In an attempt to show that a change in date will not affect prices or supply, the Proposed Rule describes information received from the Desert Grape League that "table grapes from some countries exporting to the United States must meet minimum inspection requirements on a year-round basis in both the European Union and in Canada." Without further clarification, the Proposed Rule claims that "a change in the effective date to April 1 should not affect the availability of imported table grapes because quality table grapes could easily be diverted to the U.S. market." *See*, 70 Fed. Reg. at 30008. The Proposed Rule does not disclose the actual data underlying this description. Nor was the data made available at the time the Proposed Rule was published. The Proposed Rule contains no mention of the specific varieties. Nor does the Proposed Rule contain any evidence that the so called

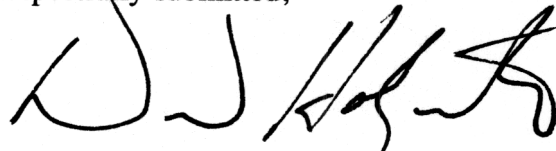
“quality grapes” shipped to Europe and Canada actually conform to USDA No. 1 shipping point standards at the time of arrival to Canadian or European destinations.

Serious procedural flaws also invalidate this rulemaking. USDA has not provided public access to data that USDA expressly cited and relied upon in the Proposed Rule. The agency also withheld the release of that data in response to the ASOEX FOIA request. The withheld data consists of a so-called proprietary report that was submitted to USDA by Coachella to support the Proposed Rule. Without access to the submitted report, ASOEX is unquestionably denied a fair opportunity to comment on the significance, if any, of the withheld report.

In view of the serious deficiencies described above, we request that the above referenced rulemaking be indefinitely suspended until such time as the following minimal procedural and statutory requirements are met:

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2. The UDSA makes publicly available with fair notice and opportunity to comment the previous season data and analysis as required by the AMAA.

Respectfully submitted,



David A. Holzworth
ASOEX General Counsel for the United States

cc: Secretary of Agriculture
Delaware, New Jersey and Pennsylvania Congressional Delegations
United States Trade Representative
Director, Office of Management and Budget
Maritime Exchange for the Delaware River and Bay
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LOS ANDES FRUIT S.A. LAS HERAS N° 158 LAS ANDES Rut. : 96.968.520-5 e-mail : losandesfruit@tie.cl FONO : (34) 463114 FAX : (34) 463114	PACIFIC FLOWERS S.A. LO NARVAEZ N° 6949 - FUNDO OJOS BUENOS - OLMUE Rut. : 96.621.100-8 e-mail : jorge@pacificflowers.cl FONO : (33) 441314 FAX : (33) 443593	PATAGONIA EXPORT S.A. ENCOMENDEROS N° 231, OF. 404 LAS CONDES - SANTIAGO Rut. : 96.935.720-8 e-mail : patagonex@patagonex.cl FONO : 2339093 FAX : 2323299
SANTIAGO COMERCIO EXTERIOR EXPORTACIONES SANCO S.A. AV. PRESIDENTE ERRAZURIZ N° 4178 LAS CONDES - SANTIAGO Rut. : 79.765.770-0 e-mail : sanco@sanco.cl FONO : 2070955 FAX : 2062431	SERGIO RUIZ-TAGLE HUMERES S.A. AVENIDA LAS CONDES N° 11.400, PISO 9 VITACURA - SANTIAGO Rut. : 2.358.505-7 e-mail : ruta@ruta.cl FONO : 4995000 FAX : 4995001	SOC. AGROINDUSTRIAL COMERCIAL Y FRUTERA AMERICANA S.A. FRUTAM S.A. AV. VITACURA N° 5093, OF. 602 VITACURA - SANTIAGO Rut. : 79.527.050-7 e-mail : rcorrea@frutam.cl FONO : 3952000 FAX : 3952090
SOCIEDAD SAN FRANCISCO LO GARCES LTDA. FUNDO STA. MARGARITA S/N, CASILLA N° 6 SAN FRANCISCO MOSTAZAL Rut. : 79.599.730-K e-mail : ecastro@sfg.cl FONO : (72) 491021 FAX : (72) 491177	SOCIEDAD AGRICOLA LA ROSA S.A. COYANCURA N° 2283, OF. 602 PROVIDENCIA - SANTIAGO Rut. : 90.831.000-4 e-mail : iossap@sofruco.cl FONO : 6700600 FAX : 2330353	SOCIEDAD AGRICOLA AGRICOM LTDA. AV. EL GOLF N° 99, PISO 3 LAS CONDES - SANTIAGO Rut. : 86.727.800-1 e-mail : rbl@agricom.cl FONO : 4313200 FAX : 4313250
SOCIEDAD AGRICOLA CERRO CAMPANARIO LTDA. CASILLA N° 380 - OVALLE Rut. : 78.395.470-2 e-mail : campan@prohens.net FONO : (53) 711306 (53) 711407 FAX : (53) 711182	SOCIEDAD AGRICOLA Y FRUTICOLA LEON LTDA. FRULE LTDA. CARMEN N° 415-A - CURICO Rut. : 77.069.390-k e-mail : jpleon@entelchile.net FONO : (75) 510821 F. FAX : (75) 510539- alt.(75) 316587- (75) 318373	SOCIEDAD DE REPRESENTACIONES INTERNACIONALES LIMITADA. LUIS RODRIGUEZ VELASCO N° 4717, OF. 02, LAS CONDES - SANTIAGO Rut. : 78.383.450-2 e-mail : mauricio.gonzalez@sri.cl FONO : 4401535 FAX : 4401540
SUN BELLE BERRIES S.A. AV. VITACURA N° 2902, OF. 508 LAS CONDES - SANTIAGO Rut. : 77.522.330-8 e-mail : jgiddings@sun-belle.cl FONO : 3346314 - 3346338 FAX : 2342591	SUNNYRIDGE FARM CHILE S.A. ALCANTARA N° 200, PISO 6 LAS CONDES - SANTIAGO Rut. : 96.991.600-2 e-mail : carlosferrer@123.cl FONO : 3702928 - 3702929 FAX : 3695657	SURES S.A. MARCHANT PEREIRA N° 367, OF. 301 PROVIDENCIA - SANTIAGO Rut. : 99.536.620-7 e-mail : amthauer@sures.cl FONO : 9463447 FAX : 9463448

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VALDOVINOS Y ARAYA LTDA. SALAS N° 326 RECOLETA - SANTIAGO Rut : 77.214.760-0 e-mail : vald.araya@123.cl FONO : 7373943 FAX : 7373383	VITAL BERRY MARKETING S.A. AV.DEL PARQUE N° 4680, OF. 503 CIUDAD EMPRESARIAL - HUECHURABA - SANTIAGO Rut : 96.567.530-2 e-mail : jjallende@vitalberry.cl FONO : 4441550 FAX : 4441620	WIESNER S.A. VITACURA N° 5250, OF. 1206 VITACURA - SANTIAGO Rut : 96.596.270-0 e-mail : wiesner@entelchile.net FONO : 3781898 FAX : 3781997

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June 3, 2005

BY FAX AND HAND DELIVERY

Ms. Zipora Bullard
FOIA/PA Officer
Rm 3517-S
Ag Stop 0202
Agricultural Marketing Services, USDA
1400 Independence Avenue, SW
Washington, DC 20250-0273

Re: Freedom of Information Act Request for Reports and Data

Docket Number FV03-925-1PR
Grapes Grown in a Designated Area of Southeastern California
And Imported Table Grapes; Proposed Change in Regulatory Periods

Dear Ms. Bullard:

On behalf of ASOEX, a trade association of Chilean fruit growers and fresh fruit exporters whose members account for approximately 90% of Chilean table grape imports to the United States, I am requesting the information listed below pursuant to the Freedom of Information Act, 5 U.S.C. §552. USDA/AMS referenced and discussed these data and reports as the bases for their decision in the above-referenced proposed rule, a copy of which is attached hereto for your reference.

The following information is requested:

- 1 All reports in support of the proposed rulemaking that were provided to AMS/USDA by the California Desert League (hereafter "League") and the data upon which the reports were based;
2. All reports and the data upon which they are based that AMS/USDA reviewed and/or relies upon in support of the proposed rulemaking;

3. All reports and supporting data provided by the League that shows a high percentage of imported grapes that were subjected to voluntary inspections and failed to meet the requested quality checks;
4. All reports and/or data that would allow an analysis of the percentage of domestic grapes that were subjected to voluntary inspections for the period after August 15 of each of the least three years;
5. All data for the last three years that reflects the use of storage by domestic producers of table grapes for the period after July 10 of each year;
6. All data that AMS/USDA collected and analyzed that supports the statement made in the proposed rulemaking that “we would not expect a shortage of grapes in the market with an earlier effective date for section 8e import requirements”, including the data that AMS/USDA analyzed to determine at what levels of imports a “shortage” occurs;
7. Copies of all the inspection data and the weekly summaries of such data compiled by the League for the period February through April for the years 2000 through 2005;
8. Copies of all inspection data and summaries independently compiled by AMS/USDA for the period February through April for the years 2000 through 2005;
9. All studies of table grape importer storage behavior performed by SURRES;
10. All studies of domestic table grape storage behavior performed by SURRES or any other entity upon which AMS/USDA relies in this rulemaking;
11. The California Desert Grape Administrative Committee Annual Reports for the years 2000 through 2005;
12. Any analyses performed or data relied upon by AMS/USDA to measure the economic impact on the Delaware River port region of the proposed rulemaking.

The notice of the proposed rule lists the following individuals as contact persons who are familiar with the above-referenced proposed rulemaking:

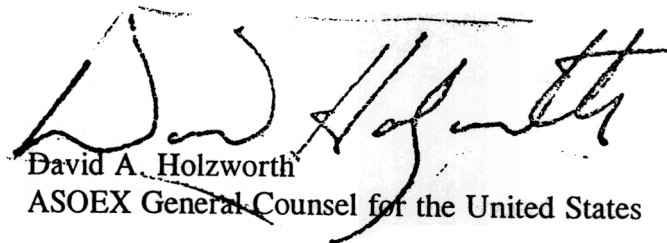
Mr. George Kelhart
STOP 0237
Marketing Order Administration Branch
Fruit and Vegetable Program
Agricultural Marketing Service, USDA
1400 Independence Avenue, SW
Washington, DC 20250-0237
Tel: 202-720-2491
Fax: 202-720-8938

Ms. Rose Aguayo or Mr. Kurt Kimmel
Marketing Order Administration Branch
Fruit and Vegetable Program
Agricultural marketing Service, USDA
2202 Monterey Street, Suite 102B
Fresno, CA 93721
Tel: 559-487-5901
Fax: 559-487-5906

We will bear all the reasonable costs related to the production of the requested information. If you deny any part of this request, please cite each specific reason that you think justifies your refusal to release the information. Please notify me of appeal procedures available under the law.

If you have any questions processing this request, please do not hesitate to contact me.

Respectfully submitted,



David A. Holzworth
ASOEX General Counsel for the United States

Attachment

By E-Mail and Hand Delivery

Mr. George Kelhart
Marketing Order Administration Branch
Fruit and Vegetable Programs
Agricultural Marketing Service, USDA
1400 Independence Avenue, SW
STOP 0237
Washington, DC 20250-0237

Delaware, New Jersey and Pennsylvania Congressional Delegations
United States Trade Representative
Director, Office of Management and Budget
Maritime Exchange for the Delaware River and Bay
Delaware River Port Authority
Embassy of Chile



United States
Department of
Agriculture

JUL - 6 2005

Marketing and
Regulatory
Programs

Agricultural
Marketing
Service

Washington, DC
20250

Mr. David A. Holzworth
Lepon Holzworth & Kato, PLLC
1225 19th Street, NW
Washington, DC 20036-2456

In reply, please refer to
FOIA No. 89-05

Dear Mr. Holzworth:

This is an interim response to your Freedom of Information Act (FOIA) request received in this office on June 6, 2005. You requested documents which covered data, reports, and analyses used to support a proposed rule to change the regulatory periods for California and imported grapes. For reference purposes, I have enclosed a copy of the first two pages of your June 3, 2005, letter with the list of requested items.

We have located documents partially responsive to your request and are ready to provide them to you. We have located documents generally responsive to items 1, 2, 3, 6, 7, 8, 9, and 11. Some of the items overlap with other items. We do not have documents relating to items 5 and 10 (Clarification: We do not have domestic storage data) or to items 4 and 12. The total number of pages we intend to release is approximately 260 pages. In addition, we intend to release a diskette with about 2000 pages of FOB prices.

Documents responsive to item 3 include approximately 360 pages of vessel browser reports for the period 2000 to 2004 prepared by the California Desert Grape League based on data from Sermaco, Inc. Executive Order 12600 and the Department of Agriculture (USDA) regulations (7 C.F.R. § 1.12) provide that whenever an agency cannot readily determine whether the information obtained from a person is privileged or confidential business information, the USDA must obtain and consider the views of the proprietary interest holder and provide the holder an opportunity to object to any decision to disclose the information. We are informing the proprietary interest holder of your request and asking for their comments.

You will receive a response concerning the vessel browser reports after consideration of any comments received from the reports' proprietary interest holder. We are, however, ready to provide you with all the other documents responsive to your request that we have located.

Under FOIA (5 U.S.C. § 552(a)(4)(A)), fees may be charged for search, review and duplication of requested documents. USDA's fee schedule is set forth at 7 CFR Part 1, Subpart A, Appendix A (4). Your request required research, review and duplication of approximately 260 pages for a total of \$1,050.00. Estimated charges are as follows:



Mr. David A. Holzworth

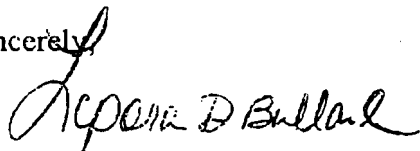
Page 2

45 hours of professional review time @ \$20 per hour	=	\$ 900.00
10 hours of clerical review and copying time @ \$10 per hour	=	\$ 100.00
260 copies @ .20 per page	=	\$ 52.00
TOTAL		\$ 1,052.00

If you wish to receive the documents collected, please send a check payable to the U.S. Treasury for \$526.00, half of the total fee. The remaining payment will be due upon your receipt of the documents.

You may appeal this action within 45 days from the date of the letter. Any such appeal should be in writing, addressed to the Administrator, Agricultural Marketing Service, Room 3071-S, Ag Stop 0201, 1400 Independence Ave., SW, Washington, DC 20250-0201. If you decide to file an appeal, please provide specific reasons why you believe a modification to our initial response is warranted. To facilitate processing your appeal, the phrase "FOIA appeal" should be placed in capital letters on the front of the envelope

Sincerely,



Zipora D. Bullard
Freedom of Information Officer

Enclosure

USDA



JUL 26 2005

**United States
Department of
Agriculture**

**Marketing and
Regulatory
Programs**

**Agricultural
Marketing
Service**

Washington, DC
20250

Mr. David A. Holzworth
Lepon Holzworth & Kato, PLLC
1225 19th Street, NW, Suite 500
Washington, DC 20036-2456

In reply, please refer to
FOIA No. 89-05

Dear Mr. Holzworth:

This is a second response to your Freedom of Information Act (FOIA) request received in this office on June 6, 2005. You requested documents which covered data, reports, and analyses used to support a proposed rule to change the regulatory periods for California and imported grapes. For reference purposes, I have enclosed a copy of the first two pages of your June 3, 2005, letter with the list of requested items.

Enclosed are documents partially responsive to your request, which include documents responsive to items 1, 2, 3, 6, 7, 9, and 11. Some of the items overlap with other items. No documents are enclosed relating to items 5 and 10 (Clarification: We do not have domestic storage data) or to items 4, 8, and 12. Documents enclosed consist of 571 pages, in addition to a diskette with about 2000 pages of FOB prices. All documents are being provided in their entirety. The enclosed documents are batched in groups and each has a coversheet that states the item to which it responds.

Further, on June 6, 2005, you modified your request to include a memo from the United States Trade Representative to the Agricultural Marketing Service. We have enclosed that memo and it is the first two pages of the enclosed documents. Also, enclosed is a copy of the proposed rule with a copy of an e-mail attached clarifying a misstatement in the rule which referenced a Philadelphia Wholesale Fruit and Vegetable Report. However, the data was actually in the Boston Wholesale Fruit and Vegetable Report. There is no charge for the copies of the e-mail and proposed rule.

As stated in my July 6, 2005, letter to you, there are other documents responsive to item 3. These include approximately 360 pages of vessel browser reports for the period 2000 to 2004 prepared by the California Desert Grape League based on data from Sermaco, Inc. Executive Order 12600 and the Department of Agriculture (USDA) regulations (7 C.F.R. § 1.12) provide that whenever an agency cannot readily determine whether the information obtained from a person is privileged or confidential business information, the USDA must obtain and consider the views of the proprietary interest holder and provide the holder an opportunity to object to any decision to disclose the information. We are informing the proprietary interest holder of your request and asking for their comments.

You will receive a response concerning the vessel browser reports after consideration of any comments received from the reports' proprietary interest holder. We are, however,

